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In The
Supreme Court of the United States
October Term, 1987

H.J., INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC F. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

v.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A. B. C. individually and D. E. F. as corporations, and other unnamed Co-conspirators,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT

ROBERT K. CORBIN
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007
602-255-4256

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

HONORABLE JOHN STEVEN CLARK
Attorney General of the State of California

HONORABLE JOHN J. KELLY
Chief State's Attorney, Connecticut

HONORABLE JIM JONES
Attorney General of the State of Idaho

HONORABLE FRANK J. KELLEY
Attorney General of the State of Michigan

HONORABLE W. CARY EDWARDS
Attorney General of the State of New Jersey

HONORABLE HAL STRATTON
Attorney General of the State of New Mexico

HONORABLE LACY H. THORNBURG
Attorney General of the State of North Carolina

HONORABLE JEAN A. BENOY
Senior Deputy Attorney General of North Carolina

HONORABLE DAVE FROHNMAYER
Attorney General of the State of Oregon

HONORABLE JIM MATTOX
Attorney General of the State of Texas

HONORABLE KENNETH O. EIKENBERRY
Attorney General of the State of Washington

HONORABLE CHARLIE BROWN
Attorney General of the State of West Virginia

HONORABLE DONALD J. HANAWAY
Attorney General of the State of Wisconsin

HONORABLE JOSEPH B. MEYER
Attorney General of the State of Wyoming

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

STATEMENT 5

SUMMARY OF ARGUMENT 5

ARGUMENT

I. "PATTERN" IS ESTABLISHED WHERE ACTS ARE RELATED AND MANIFEST OR POSE A THREAT OF CONTINUITY WITHOUT REGARD TO THE PRESENCE OF MULTIPLE SCHEMES 6

II. PATTERN UNDER STATE LAW IS AN INDEPENDENT QUESTION 15

CONCLUSION 24

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934) 4

Fedorenko v. United States, 449 U.S. 490 (1981) 4

Helvering v. Morgan's Inc., 293 U.S. 121 (1934) 9

Indian Towing Co. v. United States, 350 U.S. 61 (1955) 24

Nash v. United States, 229 U.S. 373 (1913) 10

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 15

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 23

Pillow v. Roberts, 54 U.S. (13 How.) 472 (1851) 24

Russello v. United States, 464 U.S. 16 (1983) 6, 9, 10, 12

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) ...*passim*

United States v. Bailey, 444 U.S. 394 (1980) 13

United States v. Turkette, 452 U.S. 576 (1981) 6, 9, 10, 12, 18

OTHER FEDERAL CASES:

Bank of American National Trust & Savings Ass'n v. Touche Ross Co., 782 F.2d 966 (11th Cir. 1986) 8

Bartecheck v. Fidelity Union Bank/First National State Bank, 832 F.2d 36 (3d Cir. 1987) 8

Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987) 8

Behunin v. Dow Chemical Co., 650 F. Supp. 1387 (D.C. Colo. 1986) 4, 17, 18

Cabbell v. United States, 636 F.2d 246 (8th Cir. 1980) 13

TABLE OF AUTHORITIES—Continued

Page(s)

California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987) 8

City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536 (E.D.N.Y. 1987) 14

Cook v. Zions First Nat'l Bank, 645 F. Supp. 423 (D.C. Utah 1986) 4

Elliott v. Chicago Motor Club Ins., 809 F.2d 347 (7th Cir. 1987) 13, 14

Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987) 8

Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212 (10th Cir. 1987) 8

Henry v. Farmers City State Bank, 808 F.2d 1228 (7th Cir. 1986) 15

HMK Corp. v. Walsey, 828 F.2d 1071 (9th Cir. 1987) 8

In Re Dow Co. SaraBond Products Liability, 666 F. Supp. 1466 (D.C. Colo. 1987) 18

J.G. Williams v. Regency Properties Ltd., 672 F. Supp. 1436 (N.D. Ga. 1987) 4

Lipin Enterprises, Inc. v. Lee, 803 F.2d 322 (7th Cir. 1986) 14, 15

Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987) 14

Louisiana Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781 (E.D. La. 1986) 14

Madden v. Gluck, 815 F.2d 116 (8th Cir. 1987) 8

Marshall-Silver Construction Co., Inc. v. Mendel, 835 F.2d 63 (3d Cir. 1987) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Michelson v. Merrill Lynch Pierce Fenner & Smith, 669 F. Supp. 1244 (S.D.N.Y. 1987) 4

Montesano v. SeaFirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) 8, 21

Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) 8, 10, 11, 13

Paul S. Mullin & Assoc., Inc. v. Bassett, 632 F. Supp. 532 (D. Del. 1986) 12

Plains Resources, Inc. v. Gable, 782 F.2d 883 (10th Cir. 1986) 4

Plains Resources, Inc. v. Gable, Civil No. 83-JM-2145 (D. Colo. 1984) 4

Poling v. Morgan, 829 F.2d 882 (9th Cir. 1987) 16

Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987) 8

Saine v. A.I.A., Inc., 582 F. Supp. 1299 (D.C. Colo. 1984) 19

Schnitzer v. Oppenheimer, 633 F. Supp. 92 (D.C. Ore. 1985) 4

Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393 (9th Cir. 1986) 11

Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 8, 14

Superior Oil v. Fulmer, 785 F.2d 252 (8th Cir. 1986) 8, 12

Tarrant v. Ponte, 751 F.2d 459 (1st Cir. 1985) 19

Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1979) 21

United States v. Calabrese, 645 F.2d 1379 (10th Cir. 1981) 17

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983) 7

United States v. Elliott, 571 F.2d 880 (5th Cir. 1978) 17

United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986) 8, 11, 12, 13

United States v. Iron Workers Local 86, 443 F.2d 544 (9th Cir.) 15

United States v. Joseph, 781 F. 2d 549 (6th Cir. 1986) 13

United States v. Moeller, 402 F. Supp. 49 (D.C. Conn. 1975) 17, 20

United States v. Parness, 503 F.2d 430 (2d Cir. 1974) 17

United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985) 11

United States v. Starnes, 644 F.2d 673 (7th Cir.) 17

United States v. Stofsky, 409 F. Supp. 609 (D.C. S.N.Y. 1973) 17

United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) 17

United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980) 17

STATE CASES:

Arizona ex rel. Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) 2, 3, 23

Baines v. Superior Court, 688 P.2d 1037 (Ariz. Ct. App. 1984) 2

Banderas v. Banco Central del Ecuador, 461 S.2d 265 (Fla. Dist. Ct. App. 1985) 2, 4

TABLE OF AUTHORITIES—Continued

Page(s)

Boise-Payette Lumber Co. v. Longwedel, 295 P.2d 791 (Colo. 1930) 3

Carlson v. State, 405 S.2d 173 (Fla. 1981) 2

Dombalion v. Fox, 88 Cal.App.3d 763, 765-67, 152 Cal. Rptr. 86, 87-88 (Ct. App., Div. 1, 1979) 21

Dorsey v. State, 402 S.2d 1178 (Fla. 1981) 2

Hoen v. District Court in and for the County of Arap, 412 P.2d 428 (Colo. 1966) 3

In Re Eaton's Estate, 170 Wash. 280, 16 P.2d 433 (1932) 3

Jensen v. Intermountain Health Care, Inc., 679 P.2d 903 (Utah 1984) 3

Moorehead v. State, 383 S.2d 629 (Fla. 1980) 2, 3

People v. Wahl, 716 P.2d 123 (Colo. 1986) 3

People v. Wheatridge Poker Club, 509 P.2d 324 (Colo. 1977) 3

Roash v. State, 413 S.2d 15 (Fla. 1982) 2

State v. Whiddon, 384 S.2d 1269 (Fla. 1980) 2

FEDERAL STATUTES AND REGULATIONS:

18 U.S.C. §§ 1961-68 ..... 2, 5, 6

18 U.S.C. § 1961(1) 7, 9, 19

18 U.S.C. § 1961(5) 9, 22

18 U.S.C. § 1962(a) 9, 12

18 U.S.C. § 1962(b) 9, 12

18 U.S.C. § 1962(c) 9, 12

18 U.S.C. § 1962(d) 12

TABLE OF AUTHORITIES—Continued

Page(s)

18 U.S.C. § 1963 7

18 U.S.C. § 1964 7

42 U.S.C. § 1983 (1982) 15

84 Stat. 947 (1970) 7

FEDERAL LEGISLATIVE HISTORY:

110 Cong. Rec. 14270 (1970) 15

116 Cong. Rec. 35,204 (1970) 18

S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1964) 11, 12, 13

STATE STATUTES AND REGULATIONS:

18 Pa. Cons. Stat. § 911(h) (Pardon 1983) 16, 20, 22

Colo. Rev. Stat. § 18-17-103 (Supp. 1984) 18, 19, 22, 23

Conn. Gen. Stat. Ann. § 53-394 (West Supp. 1984) 22, 23

Del. Code Ann., Title 11, § 1502 (1986) 21, 23

Fla. Stat. Ann., § 772.02(4) (1986) 21

Fla. Stat. Ann., § 772.02 (1986) 20, 23

Ga. Code Ann. § 16-14-3 (1983) 23

Hawaii Rev. Stat. § 842 (1976) 16

Idaho Code § 18-7803 (1981) 23

Ill. Rev. Stat. ch 56-Y2 § 1653(b) (Smith Hurd Supp. 1984-85) 20, 22, 23

Ind. Code Ann. § 35-45-6-1 (Burns Supp. 1982) 23

La. Rev. Stat. § 15-1351 (West 1985) 23

Miss. Code Ann. § 97-43-1-3 (Lawyers Co-op 1986) 23

N.C. Gen. Stat. § 75 D-3 (1986) 23

TABLE OF AUTHORITIES—Continued

Page(s)

N.D. Century Code § 12.1-06.1 (Smith Supp. 1983) 16

N.J. Stat. Ann. § 2C:416.2 (West Supp. 1982) 16, 23

N.M. Stat. Ann. § 30-42-1-3 (Michie Supp. 1980) 21, 23

N.Y. Crim. Proc., § 40.10(2) (1985) 21, 22, 23

N.Y. Penal Code, § 460.10 (1986) 20, 21

Nev. Rev. Stat. § 207.390 (1983) 16, 23

Ohio Rev. Code § 2923.31 (1986) 16, 21, 23

Ore. Rev. Code Ann. § 166.715 (1983) 22

Utah Code Ann. § 76-10-1602 (Smith Supp. 1985) 20, 23

Wash. Rev. Code Ann., § 9A.82.010 (West Supp. 1986) 20, 22, 23

Wis. Stat. Ann. § 946.82 (West Supp. 1984-85) 16, 21, 22, 23

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Page(s)

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III The Oxford English Dictionary 315 (1933) 10

J. Hurst, The Growth of American Law 186 (1950) 19

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The Code of Criminal Procedure of the State of New York 470-71 (1850 ed) 18

The Code of Penal Law 5 (1865 ed.) 18

United States Attorney's Manual, Title 9—Criminal Division § 9.110.340 ..... 17, 20

V The Oxford English Dictionary 152 (1933) 20

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XI The Oxford English Dictionary 251 (1933) 21

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BRIEF FOR AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the States of Arizona, California, Connecticut, Idaho, Michigan, New

Jersey, New Mexico, North Carolina, Oregon, Texas, Washington, West Virginia, Wisconsin, and Wyoming.*

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." 18 U.S.C. §§ 1961-68 (1982). Since then, twenty-seven states, including Arizona, have followed Congress' lead by adopting similar, but not identical legislation.[1] These states have employed this legislation in criminal prosecutions against a wide variety of illegal conduct.[2] Both state governments and private plaintiffs have also utilized state RICO legislation in civil litigation.[3] Although these states adopted legislation analogous to, but different from, Title IX, Federal RICO plays a vital role in interpreting the state statutes.[4]

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* The assistance in the preparation of this brief of Professor G. Robert Blakey, O'Neill Professor of Law, Notre Dame Law School, Jennifer Ann Walecki (Notre Dame '89) and Joseph P. Shannon (Notre Dame '88) is hereby acknowledged.

[1]For a detailed comparative analysis of the Federal and state legislation, see Blakey and Cessar, *Equitable Relief under Civil RICO*, 62 Notre Dame L. Rev. 526, 596 (1987) (hereinafter *Equitable Relief*).

[2]See, e.g., *Carlson* v. *State*, 405 S.2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey* v. *State*, 402 S.2d 1178, 1180 (Fla. 1981) (drugs); *State* v. *Whiddon*, 384 S.2d 1269, 1270 (Fla. 1980) (theft, burglary, arson and arson to defraud); *Moorehead* v. *State*, 383 S.2d 629, 630-31 (Fla. 1980) (auto theft).

[3]See, e.g., *Arizona ex rel. Corbin* v. *Pickrell*, 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983) (securities fraud); *Banderas* v. *Banco Central del Ecuador*, 461 S.2d 265 (Fla. Dist. Ct. App. 1985) (foreign exchange fraud).

[4]See, e.g. *Baines* v. *Superior Court*, 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); *Roash*

(Continued on following page)

Distressingly, however, decisions by lower Federal courts demonstrate a distinct hostility toward the use of civil RICO.[5] State RICO defendants use the decisions of the Federal courts to challenge state legislation in an attempt to narrow improperly the scope of the independent state statutes.[6] In the context of Federal litigation

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v. *State*, 413 S.2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on Federal decisions); *Moorehead*, 383 S.2d at 630-31 (constitutionality of "pattern" in Florida RICO statute upheld relying on Federal decisions).

The jurisprudence that directs this course of interpretation is familiar. It is reflected, for example, in the law of Colorado. When the General Assembly adopts "substantially" the provisions of an act from another jurisdiction, it "is presumed to have intended that such statute should receive by the [Colorado] courts . . . the same construction given it by the courts of [the other jurisdiction] prior to its adoption . . . ." *Hoen* v. *District Court in and for the County of Arap*, 412 P.2d 428, 431 (Colo. 1966). Subsequent decisions are of "persuasive value only." *Boise-Payette Lumber Co.* v. *Longwedel*, 295 P.2d 791, 792 (Colo. 1930). Similar language is to be read similarly. *People* v. *Wahl*, 716 P.2d 123, 128 (Colo. 1986). But where "the Colorado approach is significantly different," limitations found in the "model act" should not be read into Colorado legislation. *People* v. *Wheatridge Poker Club*, 509 P.2d 324, 327 (Colo. 1977). Colorado's jurisprudence reflects general jurisprudence. *See, e.g., Jensen* v. *Intermountain Health Care, Inc.*, 679 P.2d 903, 904-05 (Utah 1984); *In Re Eaton's Estate*, 170 Wash. 280, 281, 16 P.2d 433, 434 (1932).

[5]*See generally*, Horn, *Judicial Plague Sweeps United States Resultorientitis' Infects Civil RICO Decisions*, 5 Nat'l L.J. May 23, 1983, at 31, col. 1. Indeed, prior to this Court's decision in *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), sixty-one per cent of the reported civil RICO decisions were dismissed on motions of the defendants. *Equitable Relief* at 534. Since *Sedima*, the dismissal rate has been fifty-one percent; forty percent of them have relied on "pattern" grounds. *Id.* at 620. *See infra* n.29.

[6]*See, e.g., Arizona ex rel. Corbin*, 136 Ariz. at 596, 667 P.2d at 1311 (distinct injury limitation rejected, but urged based on

(Continued on following page)

with pendent state claims, Federal courts are also unjustifiably reading limitations into state legislation not supported by the text or appropriate policy considerations, thus frustrating the particular designs of each state's statute.[7] Equally significant, lower Federal courts are reading the text of state RICO legislation—despite differences in language and policy—in a fashion identical to Federal RICO, most often relying on "pattern" grounds for dismissal of complaints.[8] Courts "are not at liberty to imply . . . condition[s] which . . . [are] opposed to the explicit terms of . . . [a] statute . . . To [so] hold . . . is not to construe the . . . [statute] but to amend it." *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)). Nor should courts fail to recognize the differences in text and policy between Federal and state legislation.

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Federal decisions); *Banderas*, 461 S.2d at 270 (organized crime limitation rejected; "garden variety" fraud exclusion rejected, but urged, citing *Sedima S.P.R.L. v. Imrex, Inc.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985)).

[7]*See, e.g., Plains Resources, Inc. v. Gable*, Civil No. 83-JM-2145 (D. Colo. 1984) (organized crime limitation read into Federal and Colorado RICO statutes), *rev'd*, 782 F.2d 883, 887 (10th Cir. 1986) (relying on *Sedima*).

[8]*See, e.g., J.G. Williams v. Regency Properties Ltd.*, 672 F. Supp. 1436, 1442-43 (N.D. Ga. 1987) (Georgia RICO "pattern" dismissed, since like Federal RICO); *Michelson v. Merrill Lynch Pierce Fenner & Smith*, 669 F. Supp. 1244, 1250 (S.D.N.Y. 1987) (New Mexico RICO "pattern" not dismissed, since like Federal RICO); *Behunin v. Dow Chemical Co.*, 650 F. Supp. 1387, 1390 (D.C. Colo. 1986) (Colorado RICO "pattern" dismissed, since like Federal RICO); *Cook v. Zions First Nat'l Bank*, 645 F. Supp. 423, 426 (D.C. Utah 1986) (Utah RICO "pattern" dismissed, since like Federal RICO); *Schnitzer v. Oppenheimer*, 633 F. Supp. 92, 99 (D.C. Ore. 1985) (Oregon RICO "pattern" dismissed, since like Federal RICO). *See infra* n.29.

Accordingly, Amici urge this Court to give to Federal RICO an appropriate construction on the issue of "pattern" and to provide appropriate guidance for the lower courts to use when undertaking the sensitive task of making the required independent analysis of state RICO statutes.

—o—

STATEMENT

For the statement of the facts and course of the legal proceedings below, the Court is respectfully directed to the briefs of the parties.

One issue is presented:

Whether the Petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. §§ 1961-68?

Amici urge this Court to answer this issue in the affirmative.

—o—

SUMMARY OF ARGUMENT

In 1970, Congress enacted RICO as Title IX of the Organized Crime Control Act. In *Sedima* this Court suggested that the Federal courts reexamine "pattern" within the context of Federal RICO. The result has been a series of conflicting decisions. An examination of the text, legislative history, and policy of Federal RICO indicates that "pattern" means a "design" that reflects "relationship" and "continuity." Different "designs" are possible depending on the different uses of the concept of "pattern" within RICO. Nothing in the text, legislative history, or policy of RICO justifies the adoption of a rigid multiple scheme limitation.

No matter how Federal RICO is read, the definition of "pattern" in state legislation is an independent question. The language of the Federal RICO statute is not identical with the language used by the twenty-seven states that followed Congress' lead by adopting similar RICO legislation. The RICO statute of each state has its own legislative history, text, and jurisprudence. This Court's explication of the Federal "pattern" requirement provides guidance to Federal courts on the interpretation of each state's RICO statute in cases in which such interpretation is presented. Although this case does not directly present such interpretation, Amici urge this Court to provide guidance that state RICO statutes must be read on their own merits and not automatically in a fashion identical to their Federal counterpart.

—o—

ARGUMENT

I

"PATTERN" IS ESTABLISHED WHERE ACTS ARE RELATED AND MANIFEST OR POSE A THREAT OF CONTINUITY WITHOUT REGARD TO THE PRESENCE OF MULTIPLE SCHEMES.

In 1970, Congress enacted RICO as Title IX of the Organized Crime Control Act. 18 U.S.C. §§ 1961-68 (1982). It was designed to provide a new weapon for the assault on organized crime. *Russello v. United States*, 464 U.S. 16, 26 (1983). The statute targeted but was not limited to, the infiltration of legitimate businesses by organized crime figures. *United States v. Turkette*, 452 U.S. 576, 590-91 (1981); *Russello*, 464 U.S. at 26, 28; *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 495 (1985). Indeed,

18 U.S.C. § 1962 made it unlawful for "any person" to violate its substantive provisions by engaging in a "pattern of racketeering activity" by, through, or against any "enterprise."[9] If a person violates RICO's provisions by engaging in the prohibited "pattern of racketeering activity,"[10] he has, in effect, engaged in "organized crime," and is appropriately subject to RICO's criminal and civil sanctions.[11] RICO is to be liberally construed. 84 Stat. 947 (1970). Its sanctions were designed to supplement, but not supersede, other Federal and state criminal and civil remedies. *Id.*

This Court's opinion in *Sedima* contained the now often cited footnote number 14, which stated, "the failure of Congress and the courts to develop a meaningful concept of 'pattern' . . . resulted in the extraordinary uses to which civil RICO . . . [had] been put . . ." 473 U.S. at 500. Ignoring the general teachings of this Court in

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[9]*Sedima*, 473 U.S. at 495. *See generally, United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior . . . [ranging] from single political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavor") (quoting, Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts Criminal and Civil Remedies*, 53 Temple L. Q. 1009, 1013-14 (1980), *cert. denied*, 465 U.S. 1005 (1984); Goldsmith, *RICO and Enterprise Criminality*, 88 Col. L. Rev. (1988).

[10]"Racketeering activity" is defined in 18 U.S.C. § 1961(1) to mean various forms of conduct in violation of listed Federal and state criminal statutes. It is not necessary, however, that a person be previously convicted of one of the listed offenses before the person can be found responsible under the criminal or civil provisions of RICO. *Sedima*, 473 U.S. at 490 n.8, 500 n.14.

[11]RICO's criminal sanctions include imprisonment, fine and forfeiture. 18 U.S.C. § 1963 (1982). RICO's civil sanctions include injunctions and treble damages. 18 U.S.C. § 1964 (1982).

Sedima, and narrowly focusing on footnote 14, the lower courts have continued to dismiss the majority of civil RICO cases filed, most often relying on "pattern" grounds. Conflicting circuit court decisions employ diverse and confusing uses of the concept of "pattern."[12] This jurisprudential confusion has been aptly termed "sheer bedlam."[13]

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[12]*Compare Bartecheck v. Fidelity Union Bank/First National State Bank*, 832 F.2d 36, 38-40 (3rd Cir. 1987) (multiple scheme test rejected; need not be open ended; multiple factors); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987) (single episode limitation rejected); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) (multiple scheme or episode limitation rejected; multiple factors must be considered); *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986) (multiple scheme limitation rejected; continuity for "pattern" may be found from continuing character of enterprise and open-ended nature of scheme); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 974-77 (7th Cir. 1986) (multiple scheme limitation rejected; "pattern" may be found where series of discrete harms inflicted) *and Bank of American National Trust & Savings Ass'n v. Touche Ross Co.*, 782 F.2d 966, 987 (11th Cir. 1986) (different criminal episodes test rejected); *with Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987) (single discrete scheme not "pattern"); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (9th Cir. 1987) (single development scheme not "pattern"), *cert. denied*, 107 S. Ct. 706 (1988); *Superior Oil v. Fulmer*, 785 F.2d 252, 255-58 (8th Cir. 1986) (single scheme established relationship, but negates continuity for "pattern") *and Madden v. Gluck*, 815 F.2d 116 n.1 (8th Cir. 1987) (*Fulmer* "adhere[d] to" despite *Ianniello*). For an excellent analysis of "pattern" that precedes, but anticipates the holdings of *Bartecheck*, etc., *see* Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 Notre Dame L. Rev. 92 (1986) (cited with approval in *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987)). *See also Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2nd Cir. 1987) (enterprise must have continuity); *Montesano v. Sea First Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (*Beck* followed).

[13]*Furman v. Cirrito*, 828 F.2d 898, 909 (2nd Cir. 1987) (Pratt, J. in dissent). For a detailed critique of "pattern," *see Equitable Relief* at 535 n.37.

Amici urge this Court to avoid the narrow approach of the lower courts and to adopt a straightforward definition of "pattern" within RICO.

Any effort to develop a meaningful definition of "pattern" ought to begin with the language of the statute. *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20; *Turkette*, 452 U.S. at 580.[14] The statute says "activity." 18 U.S.C. § 1961(1) (1982). It does not say "schemes" or "episodes." The statute "requires" that the "activity" be composed of "at least two acts." 18 U.S.C. § 1961(5) (1982). RICO's text, therefore, limits, but does not define "pattern."[15] *Sedima*, 473 U.S. at 496, n.14 ("while two acts are necessary, they may not be sufficient"). Accordingly, "pattern" should be read in its ordinary or plain

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[14]The definition of "pattern" must serve six functions:

1. The definition of criminality (when an indictment *may* be returned);
2. A statement of a claim for relief (when an action *may* be brought);
3. The principal of claim preclusion (when an action *must* be brought);
4. The application of the statute of limitation (when, in whole or in part, it is *too late* to bring an action);
5. The scope of discovery before trial; and,
6. The admissibility of evidence at trial.

Any definition of "pattern" must be faithful to the text of the statute, its legislative history, and its purpose. In addition, the definition ought to meet two tests: it ought to work equally well on the civil and criminal sides of the statute, and it ought to work equally well in §§ 1962(a), (b) and (c).

[15]*See generally Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934) (discussion of difference between "means" and "includes"); Blakey, *The RICO Civil Action in Context*, 58 Notre Dame L. Rev. 237, 241 n.16 (1982) (hereinafter *Civil Action*).

meaning, yet viewed within the context of the entire statute. *Sedima*, 473 U.S. at 489, 495 n.13; *Russello*, 464 U.S. at 21, 22-23; *Turkette*, 452 U.S. at 580, 582, 587. The ordinary or plain meaning of "pattern" is "design."[16] Obviously, a single kind of "design" is not required for all sections or all uses of the concept within each section.[17] Thus, the requirement of "pattern" is a standard, not a rule.[18]

The legislative history of the statute should also be examined. *Sedima*, 473 U.S. at 486; *Turkette*, 452 U.S. at 586. Neither the text nor the legislative history requires a "single scheme" or "multiple schemes" for a showing

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[16]The Oxford English Dictionary paraphrases "pattern" as "design" or "discernible form." *See* VII The Oxford English Dictionary 565-66 (1933) (thirteen uses are noted; number eight refers to "design"); III the Oxford English Dictionary 315 (1933) (definition number 8C: "An arrangement or order of things or activity in abstract sense; order or form discernible in things, actions, idea, situations, etc. Freq. with *of*, as *pattern of behavior* . . . and as second element with defining word.") (emphasis in original).

[17]*See RICO Revisited: An Advanced Seminar on the Latest Techniques in Civil Suits*, 157 (1987) ("Pattern" may be used in RICO violation in at least 240 different contexts [3 (sections) x 5 (kinds of enterprises) x 4 (kinds of predicate offenses) x 4 (roles in violations) = 240]."); *See* L. Wittgenstein, Philosophical Investigation 20 (2d ed. 1953) ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language.") (emphasis in original).

[18]*Morgan*, 804 F.2d at 976 ("The doctrinal requirement of pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular use with no one factor being necessarily determinative."); II R. Pound, Jurisprudence 124-29 (1959). *See also Nash v. United States*, 229 U.S. 373, 376 (1913) ("restraint of trade") (Holmes, J.) ("[T]he law is full of instances where a man's fate depends on . . . some matter of degree.")

of "pattern."[19] "Schemes" or "episodes" are not mentioned either.[20] In fact, the legislative history materials specifically point to only two goals that any definition of the concept of "pattern" ought to reflect: "relationship" and "continuity." *See, e.g.*, S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1964). Their inclusion in the concept reflects a desire to target more than mere "sporadic activity." *Id.*

If such concepts as "scheme" or "episode" are relevant to a text-based approach to the concept of "pattern" that reflects the notion of "design," the concepts would have validity solely as *tests* for the presence of congressionally-mandated goals. For example, a single "episode" (defined to mean several acts, so closely related in time and placed that they may be fairly described as producing but a single harm will not carry with it the reality or the threat of continuity. *See, e.g., Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (diversion of single shipment of product not pattern). As such, no pattern will be present. Yet a "multiple scheme" or "multiple episode" test ought not to be elevated to a *judicially* imposed requirement that

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[19]*Compare United States v. Qaoud*, 777 F.2d 1105, 1106 (6th Cir. 1985) (single scheme not required: acts need only be related by enterprise), *cert. denied*, 106 S. Ct. 1499 (1986) *and* A.B.A. Criminal Justice Section, Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee 36-37 (1985) (common scheme limitation rejected, since it would frustrate the application of RICO to conglomerates of crime); *Morgan*, 804 F.2d at 975 (single scheme not precluded; "otherwise . . . a single scheme would automatically escape RICO liability . . . untenable result.").

[20]*Ianniello*, 808 F.2d at 192 n.16 (no "clear legislative history" mandating multiple schemes).

would be *inflexibly* applied as a substitute for congressionally mandated elements.

The point is most clearly seen in the context of Sections 1962(b) and (d) of RICO. In construing "pattern," most of the lower courts have concentrated on Section 1962(c). *See, e.g., Superior Oil,* 785 F.2d at 255; *but see id.* at 255 and n.1 (§§ 1962(a), (b), and (c) "share in common" the "pattern" concept). Suppose, however, that the multiple scheme limitation were applied to Section 1962(b), which deals with the takeover of an enterprise, and which, all concede, represents the principal, albeit not exclusive, purpose of RICO. *See Russello,* 464 U.S. at 28; *Turkette,* 452 U.S. at 590-91. Should no pattern be found where the racketeering activity was engaged in pursuant to a single scheme, then Section 1962(b) will have been read out of the statute—or at least rewritten to prohibit *only* the acquisition of multiple enterprises. *Ianniello,* 808 F.2d at 192 ("requiring two schemes to establish pattern would effectively eleminate" § 1962(b)).[21] Such a result would be both "absurd" and "surprising." *Turkette,* 452 U.S. at 587. It is not what Congress intended. S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) ("The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.")

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[21] *See also Paul S. Mullin & Assoc., Inc. v. Bassett,* 632 F. Supp. 532, 541 (D. Del. 1986) ("[A]n attempt by a racketeering enterprise to infiltrate General Motors could involve countless acts. . . . One could argue, however, that [no pattern was] involved because only one company was subverted. Under this view, a 'pattern' would come into existence only after the same enterprise began to infiltrate Chrysler or Ford.").

Thus, to be successful, the takeover of a legitimate business—even though accomplished in the context of a "single scheme" or "single episode"—would "normally" require not only the act of takeover, but also a "threat" of continuing criminal activity to maintain its objective. Otherwise, the business could be reclaimed at any time. *See Morgan,* 804 F.2d at 975. ("To focus excessively on either continuity or relationship alone effectively negates the remaining prong.")

Similarly, requiring multiple schemes for "pattern" potentially conflicts with Section 1962(d) (conspiracy). A requirement of multiple schemes might defeat a single conspiracy charge. Conversely, a showing of a single conspiracy might preclude a finding a multiple schemes for "pattern."

One act does not make a pattern. *United States v. Joseph,* 781 F.2d 549, 554 (6th Cir. 1986). Nor do isolated acts. S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) ("[O]ne 'isolated racketeering' activity . . . [is] insufficient . . . .") Nothing in the text or the legislative history of the statute indicates that continuity (or its threat) may *only* be found in, or inferred from, the racketeering activity itself. It is wholly consistent with the text and legislative history of the statute to find continuity in *any aspect of a violation* that relates to the racketeering activity. *Ianniello,* 808 F.2d at 190-91 (threat of continuity found from ongoing character of organized group). Con-

tinuity, too, should be tested *during* the "pattern," not after its termination.[22]

RICO is part of Title 18, the Federal criminal code. As such, "act" is best understood in the traditional sense of *actus reus* and *mens rea*. *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) ("Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law. . . ."). When examining the "acts" that make up an alleged "pattern," no reason exists for focusing on a *purely* jurisdictional "act," that is, a mailing, a use of wire communication, or interstate or foreign transportation. *See e.g., Elliott v. Chicago Motor Club Ins.*, 809 F.2d 347, 350 (7th Cir. 1987) (mailings relating to same fraud not distinct for purpose of determining pattern); *cf. Cabbell v. United States*, 636 F.2d 246, 248-49 (8th Cir. 1980) (proper prosecutorial unit under § 2314 may ignore jurisdictional elements).

While "pattern" must be read consistently in criminal and civil litigation, the "acts" that constitute the "pattern" may differ. *Elliott*, 809 F.2d at 350 (quoting *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring) ("a multiplicity of mailings does not reasonably translate directly into a 'pat-

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[22]*Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63, 66 (3rd Cir. 1987) ("poses or posed"); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1309 (7th Cir. 1987) ("duration of the predicate acts"); *Sun Savings*, 825 F.2d 194 n.5 (9th Cir. 1987); *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 545 (E.D.N.Y. 1987) (continuity measured between acts not at termination); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 810 (E.D. La. 1986) (would have continued if not caught).

tern' ")). *Compare Lipin Enterprises*, 803 F.2d at 325 (Cudahy, J.) ("It is not clear that the same analysis would be appropriate in cases involving other kinds of predicate acts [such as] arson."). The cause should focus on "act"—the *actus reus*—that inflicts discrete harm. *Morgan*, 804 F.2d at 975. Using this approach, a "pattern" may exist when at least two acts, which are "designed" or have "discernible form" in reference to themselves or to the enterprise occur, and which reflect continuity (or its threat), either by looking at the acts themselves (*e.g.*, many bribes paid over a period of time), the purpose for which they were committed (*e.g.*, obtaining, on a continuing basis, valuable rate consideration) or the enterprise itself (*e.g.*, a corporation, a public commission, or an on-going association of persons and entities). Under this approach, little doubt exists that the Petitioners in this appeal stated a "pattern"[23] in their complaint. The judgment of the Court of Appeals should be reversed.

II

PATTERN UNDER STATE LAW IS AN INDEPENDENT QUESTION

No matter how Federal RICO may be interpreted, crucial differences exist between Title IX and the definitions of

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[23]For parallel concepts, *see Henry v. Farmer City State Bank*, 808 F.2d 1228, 1237 (7th Cir. 1986) (municipal liability under 42 U.S.C. § 1983 (1982) ("[A] plaintiff must allege [under *Oklahoma City v. Tuttle*, 471 U.S. 808, 814 (1985)] a specific pattern or series of incidents that support the general allegations of custom or policy . . . ."); *United States v. Iron Workers Local 86*, 443 F.2d 544, 551-52 (9th Cir.) ("pattern or practice" prerequisite for an attorney general suit under Title VII: defined as "more than an isolated, sporadic incident, but is repeated routine of a generalized nature") (quoting 110 Cong. Rec. 14270 (1970)) (remarks of Sen. Hubert H. Humphrey), *cert. denied*, 404 U.S. 984 (1971).

"pattern" found in the individual state statutes that have pattern requirements. Although some states do not use "pattern" at all in their statutes, but instead rely on the more general concept of "racketeering activity,"[24] all state RICO statutes are vulnerable to unwarranted limitations imposed in Federal courts interpreting them. Analysis of state RICO statutes requires independent examination of their particular words and histories consistent with their rich variety and with the principles of federalism.

The selection of a limitation or a definition of the pattern concept differs among the states. New Jersey[25] follows Federal RICO, creating only a limitation, while Pennsylvania[26] says "refers." The statutes of the remaining states that require patterns say "means,"[27] thus providing an exact definition of "pattern."[28] It is, therefore, inappropriate to read Federal concepts (i.e., "scheme" or "episode") into these definitions, especially

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[24]See, e.g., *Poling* v. *Morgan*, 829 F.2d 882, 887 (9th Cir. 1987) (Arizona RICO). *See also, Hawaii Rev. Stat.* § 842 (1976); *N.D. Century Code* § 12:1-06.1 (Smith Supp. 1983).

[25]*N.J. Stat. Ann.* § 2C:41-1 (d) (1), (2) (West Supp. 1982) ("Pattern of racketeering activity" requires . . .).

[26]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983) ("Pattern of racketeering activity" refers . . .).

[27]See, e.g., *Nev. Rev. Stat.* § 207.390 (1983) ("Racketeering activity" means . . .); *Ohio Rev. Code* § 2923.31 (1986) ("Pattern of Corrupt Activity" means . . .); *Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85) ("Pattern of racketeering activity" means . . .).

[28]See *supra* n. 15.

where the Federal concepts do not have textual support in the state statutes,[29] and particularly where these state

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[29]It is particularly inappropriate to use Federal jurisprudence on "multiple schemes" or "multiple episodes" developed *after* the effective date of a state statute to narrow a state statute. *See, e.g., Behunin v. Dow Chemical Co.*, 650 F. Supp. 1390 (D.C. Colo. 1986) (Kane, J.) ("pattern" under Colorado RICO "coincide[s] with the meaning of its Federal counterpart.")

In fact, before 1981, the effective date of the Colorado statute, RICO defense counsel made a major effort to exclude a "single episode" from Federal RICO. As a matter of law, it did not succeed. *See, e.g., United States v. Moeller*, 402 F. Supp. 49, 57-58 (D.C. Conn. 1975) (single episode limitation advocated under § (c) but rejected as inconsistent with precedent under § (b) thought to be controlling). As a matter of prosecutorial discretion, it did. *United States Attorney's Manual*, Title 9—Criminal Division § 9.110.340 (RICO prosecution not to be brought where only a single episode). In addition, the uniform holding in the Federal decisions prior to 1981 was that "two acts," not "two schemes," were all that was required to establish a "pattern." *See, e.g., United States v. Parness*, 503 F.2d 430, 441-42 (2nd Cir. 1974) ("pattern" requires "two acts," not "two schemes") *cert. denied*, 419 U.S. 1105 (1975)); *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978) (same); *United States v. Starnes*, 644 F.2d 673, 677-78 (7th Cir.), *cert. denied*, 454 U.S. 826 (1982) (same); *United States v. Calabrese*, 645 F.2d 1379, 1389 (10th Cir.) (same), *cert. denied*, 454 U.S. 831 (1981).

Prior to 1981 the Federal courts had held that if the prosecution could show a "common scheme or plan" involving multiple acts, a "pattern" was present. *United States v. Stofsky*, 409 F. Supp. 609, 614 (D.C. S.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Some interpreted this holding to mean that a "pattern" could *only* be found if there were a "common scheme or plan" linking the "acts." Later decisions definitively established that as long as the "acts" were related to the affairs of an enterprise, a "pattern" was present, regardless of whether a "common scheme or plan" existed. *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) (citing *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978)). Thus, at

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statutes, like their Federal counterpart, are to be liberally construed.[30]

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the time Colorado RICO was passed in 1981, it was possible to show "relationship" under Federal RICO solely through the enterprise concept. The Federal courts, in short, had neither imposed a requirement that the "acts" be related to one another, nor adopted a narrow concept of continuity requiring multiple schemes. Even a cursory examination of the language used to define "pattern" under the Colorado statute should have made it clear that its definition was "significantly different" from that of Federal RICO. *See Colo. Rev. Stat.* § 18-17-103 (Supp. 1984). As such, limitations on RICO judicially crafted in the Federal courts *since* 1981 should not have been read into the Colorado statute. *See supra* n.4.

The author of the *Behunin* opinion has been unusually candid about his personal feelings toward RICO. "RICO is just . . . a rather sloppily thought out kind of way to get the Mafia that every body jumps on so that they can have more fun with fraud." *In Re Dow Co. SaraBond Products Liability*, 666 F. Supp. 1466, 1470 (D.C. Colo. 1987) (Kane, J.). As such, "policy considerations" warrant the statute being "put to rest." *Id. Compare* 116 Cong. Rec. 35,204 (1970) (statements of Cong. Poff) ("no single measure [had] received more thorough consideration"); *Iannelli v. United States*, 420 U.S. 770, 789 (1975) ("carefully crafted piece of legislation") *with United States v. Turkette*, 452 U.S. 576, 587 (1981) ("there is no argument that Congress acted beyond its power . . . that being the case, the courts are without authority to restrict the applications of the statute.").

[30]The presence of a liberal construction clause is not unusual in state law. Such clauses had their origin in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. 1 E. Livingston, Complete Works on Criminal Jurisprudence 231 (1873 ed.); 1 E. Livingston, *supra*, at 14. ("[A]ll penal laws whatever are to be construed according to the plain import of their words. . . ."). Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. The Code of Penal Law 5 (1865 ed.) ("fair import"); The Code of Criminal Procedure of the State of New York 470-

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Federal RICO uses "acts" as its unit for counting for "continuity." 18 U.S.C. § 1961(1) (1982). The states, on the other hand, utilize a variety of concepts in their attempt to establish a similar "continuity" prong for

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71 (1850 ed.) (revised code to be given "liberal construction" as the old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered, seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous"). Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. C. Wright & A. Miller, Federal Practice and Procedure § 104 (1969).

Judicial hostility to change through legislation was common in the 19th century. *See* J. Hurst, The Growth of American Law 186 (1950):

> [W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . . .
>
> The effect was to put a primarily obstructive, if not destructive connotation on the process of statutory interpretation.

Legislatures reacted. "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, Roscoe Pound: Philosopher of Law 174 (1974); *see* E. Patterson, Jurisprudence: Men and Ideas of the Law 421 (1953). In fact ,a majority of states have abolished the common law rule. *Civil Action*, at 237, 245, n.25 (1982). Judicial hostility, however, continues into the 20th century. *See, e.g. Sedima*, 473 U.S. at 529 (Powell, J.) (liberal construction applies only to criminal provisions); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D.C. Colo. 1984) (same) (Kane, J.). Courts have recognized that strict construction is not of constitutional dimension. *See, e.g., Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985).

"pattern." Colorado,[31] Illinois,[32] New York,[33] Pennsylvania[34] and Washington[35] follow Federal RICO by counting "acts." The remainder of "pattern" states expressly count "incidents,"[36] "episodes"[37] or "events,"[38] each of which is synonymous with "occurrence."[39] They reflect the position advocated by Judge Newman in *United States v. Moeller*[40] and codified by the guidelines of the Department of Justice[41] that more than one occurrence is required. This intent is most evident in the more recently

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[31]*Colo. Rev. Stat.* § 18-17-103 (Supp. 1984) ("Pattern of racketeering activity means engaging in at least two acts. . . .").

[32]*Ill. Rev. Stat.* ch. 56-Y2 § 1653(b) (Smith Hurd Supp. 1984-85) ("Pattern of narcotics activity means two or more acts. . . .").

[33]*NY Penal Code* § 460.10 (1986) ("Pattern of criminal activity means conduct engaged in by persons . . . constituting three or more criminal acts.").

[34]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983) ("pattern of racketeering activity refers to a course of conduct requiring two or more acts. . . .").

[35]*Wash. Rev. Code Ann.*, § 9A.82.010 (West Supp. 1986) ("Pattern of criminal profiteering activity means engaging in at least three acts. . . .").

[36]*See, e.g., Fla. Stat. Ann.*, § 772.02 (1986) ("Pattern of criminal activity means engaging in at least two incidents. . . .").

[37]*Utah Code Ann.* § 76-10-1602 (Smith Supp. 1985) ("Pattern of racketeering activity means engaging in at least two episodes of racketeering conduct.").

[38]*See, e.g., Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986) (" . . . not be isolated events. . .").

[39]V Oxford English Dictionary 152 (1933) (incident-French); III *id.* 245 (episode-Greek), 338-39 (event-Latin).

[40]402 F. Supp. 49, 57-58 (D.C. Conn. 1975), *cert. denied*, 429 U.S. 1039 (1977). *See supra* n.29.

[41]United States Attorney's Manual, Title 9—Criminal Division § 9-110.340 ("single criminal episode"). *See supra* n.29.

enacted statutes, which specifically preclude counting as separate occurrences those that are too closely related in point of time and place.[42] None of these states, however, exclude from "pattern" a "single scheme."[43] As in Federal RICO, the focus is on the conduct of people, not their state of mind, and these definitions do not lend themselves to a "semantical game of generalizing the illegal objective." *Montesano v. SeaFirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (Higginbothan, J.).

Federal RICO has included the "relationship" requirement in "pattern" through its legislative history. The states, on the other hand, use a variety of methods to deal with the factor of "relationship." New Mexico relates "incidents" solely by intent.[44] Pennsylvania re-

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[42]*See, e.g., Del. Code Ann.*, Title 11, § 1502 (1986); *N.Y. Penal Code*, § 460.10 (1986); *Ohio Rev. Code* § 2923.31 (1986); *Wis. Stat. Ann.*, § 946.82 (West Supp. 1984-85).

[43]On the other hand, New York (*N.Y. Crim. Proc.*, § 40.10(2) (1985) ("Criminal transaction" means conduct which established at least one offense, and which is comprised of two or more of a group of acts either (a) so closely related in point of time and circumstances of commission as to constitute a single criminal incident, or (b) constitute elements or integral parts of a single criminal venture")) and Florida (*Fla. Stat. Ann.*, § 772.02(4) (1986) ("For the purposes of this chapter, the term 'pattern of criminal activity' shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons")) preclude a single "transaction" from constituting a "pattern." "Transactions" may be paraphrased as "the carrying on or completion of an action or *course* of action." XI Oxford English Dictionary 251 (1933) (emphasis added). It can, therefore, be read either narrowly or broadly. *Compare, Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 746 (5th Cir. 1979), *with Dombalion v. Fox*, 88 Cal.App. 3rd 763, 765-67, 152 Cal.Rptr. 86, 87-88 (Ct. App., Div. 1 1979).

[44]*N.M. Stat. Ann.* § 30-42-1-3 (Michie Supp. 1980).

quires a "course of conduct."[45] Where the enterprise is a legitimate one, New York requires a common scheme or plan; if the enterprise is illegitimate, state of mind and association with the enterprise suffice.[46] Colorado, Delaware, and Ohio specify that any relationship to the affairs of the enterprise is enough to establish the "relationship" prong of "pattern."[47] The remaining "pattern" states require that the occurrences be interrelated,[48] yet none provide a definition of "interrelated." Connecticut, Oregon and Washington explicitly resolve this ambiguity by expressly including a "nexus" to the affairs of the enterprise as a form of "interrelation."[49]

Federal RICO requires "at least two acts" committed "within ten years" of one another. 18 U.S.C. § 1961(5) (1984). New York, Washington, and Wisconsin require three acts,[50] while Pennsylvania imposes no time limitation.[51] Tennessee requires that the acts be committed within two years of one another;[52] Connecticut, Florida,

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[45]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983).

[46]*N.Y. Crim. Proc.* § 40.10 (1985).

[47]38 *Colo. Rev. Stat.* § 17-18-103 (Supp. 1984); *Del. Code Ann. Title 11,* § 1502 (1986); *Ohio Rev. Code* § 2923.31 (1986).

[48]*See, e.g., Ill. Rev. Stat.* ch 56½ § 1653 (Smith Hurd Supp. 1984-1985).

[49]*Conn. Gen. Stat. Ann.* § 53-394 (West Supp. 1984); *Ore. Rev. Code Ann.* § 166.715 (1983); *Wash. Rev. Code Ann* § 9A. 82.010 (West Supp. 1986).

[50]*N.Y. Crim. Proc.* § 40.10 (1985); *Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986); *Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85).

[51]18 *Pa. Cons. Stat.* § 911(h) (Pardon 1983).

[52]*Tenn. Code Ann.* § 93-1-1003 (1986).

Idaho, Georgia and North Carolina, four years;[53] Illinois, Indiana, Louisiana, Mississippi, Nevada, New Mexico, Oregon, Utah and Washington, five years;[54] Ohio, six years;[55] and Wisconsin, seven years.[56] The rest follow the Federal statute.[57]

Since the various state statutes substantially differ from their Federal counterpart, Federal courts interpreting the state statutes must pay close attention to the texts of the state statutes when faced with a state RICO claim. Neither crowded court dockets nor considerations of Federalism ought to play a role in the Federal judiciary's reading of state RICO legislation, whatever role such considerations may properly play in reading Federal statutes. *Compare, Patsy v. Florida Board of Regents,* 457 U.S. 496, 512 n.13 (1982) (burden on Federal courts "not sufficient to justify a judicial decision to alter [a] congressionally [drafted scheme]") *with Arizona ex rel. Corbin, v. Pickrell,* 136 Ariz. at 591, 667 P.2d at 1306

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[53]*See, Conn. Gen. Stat. Ann.* § 53-394 (West Supp. 1984); *Fla. Stat. Ann.* § 772.02 (1986); *Idaho Code* § 18-7803 (1981); *Ga. Code Ann.* § 16-14-3 (1983); *N.C. Gen. Stat.* § 75 D-3 (1986).

[54]*See, Ill. Rev. Stat.* ch 56½ § 1653(b) (Smith Hurd Supp. 1984-85); *Ind. Code Ann.* § 35-45-6-1 (Burns Supp. 1982); *La. Rev. Stat.* § 15-1351 (West 1985); *Miss. Code Ann.* § 97-43-1-3 (Lawyers Co-op 1986); *Nev. Rev. Stat.* § 207.390 (1983); *N.M. Stat. Ann.* § 30-42-1-3 (Michie Supp. 1980); *Ore. Rev. Code Ann.* § 166.715 (1983); *Utah Code Ann.* § 76-10-1602 (Smith Supp. 1985); *Wash. Rev. Code Ann.* § 9A.82.010 (West Supp. 1986).

[55]*Ohio Rev. Code* § 2923.31 (1986).

[56]*Wis. Stat. Ann.* § 946.82 (West Supp. 1984-85).

[57]*See, e.g., N.J. Stat. Ann.* § 2C:41-1(d)(1) (West Supp. 1982); *Del. Code Ann. Title 11,* § 1502 (1986); *Colo. Rev. Stat.* § 18-17-103 (Supp. 1984).

(concern for federalization of state cases is not a consideration in interpretation of Arizona RICO).

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CONCLUSION

Under a proper construction of "pattern," the Petitioners stated a claim for relief under Federal RICO. This Court ought, therefore, to reject the jurisprudence of the lower courts, which seems more intent on frustrating RICO than implementing it.[58] The judgment of the Court of Appeals should be reversed and the Petitioners' complaint reinstated.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona

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[58]More than 100 years ago, this Court noted, "it is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . [By such] a construction [it is possible to] annul [it] and render[] it superfluous and useless." *Pillow* v. *Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). *See also, Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (Tort Claims Act) (rejecting "distinctions so fine spun and capricious as to be almost incapable of being held in the mind for adequate formulation"). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such construction (1) "tend[ed] to bring the law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." 3 Jurisprudence 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490.

APPENDIX

Racketeer Influenced And Corrupt Organizations Statute (18 U.S.C. 1961-1968)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (reltaing to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud, sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racke-

teering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to white slave traffic), (C) any act which is indictvehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to whiteslave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any

part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be forfeited to the united States, unless the transferree establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought, would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on

which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall di-

rect the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in

the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is

earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which give rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(n) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter

may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one

hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a

civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified.

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principle place

of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodan to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for offical use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case

or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary

material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.